

Supreme Court, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-68

RAYMOND LEDFORD AND MATILDA LEDFORD,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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OPINIONS BELOW

The opinion of the District Court for the Northern District of California granting the United States' Motion to Dismiss is unreported and appears in Appendix B, *infra*, pp. B-1 to B-4. The opinion of the Ninth Circuit Court of Appeals affirming the dismissal is unreported and appears in Appendix A, *infra*, pp. A-1 to A-2.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1976. A petition for rehearing with a suggestion for a rehearing en banc was denied on April 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the strict construction of 26 U.S.C. §6512(a) given to said statute by the courts below and other lower federal courts renders said statute unconstitutional as being violative of the due process clause of the Fifth Amendment.

2. Whether the doctrine of equitable estoppel may be applied against the United States when a statement by a judge made in open court, and acceded to by counsel for the government, induces a citizen to waive his constitutional right for an opportunity to be heard.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution: "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

2. The portion of 26 U.S.C. §6512(a) pertinent to the issues presented in this petition provides as follows:

"§6512. Limitations in case of petition to Tax Court

(a) Effect of petition to Tax Court.—If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and chapter 42 or 43 taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), no credit or refund of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 42 or 43 with respect to act (or failure to act) to which such petition relates, in respect of which the Secretary or his delegate has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—"¹

STATEMENT OF THE CASE

On March 10, 1969, petitioners Raymond and Matilda Ledford were issued statutory deficiency notices by the Commissioner for their individual income taxes for the calendar years 1965, 1966 and 1967.²

¹26 U.S.C. §6512(a) has been revised since petitioners' suit was dismissed in District Court but said revisions do not affect the issues presented in this petition. The statute as it presently reads is presented here.

²References to "Commissioner" include Internal Revenue Service agents, employees, or representatives.

On June 10, 1969, petitioners, under 26 U.S.C. §6213(a), filed petitions, *in pro per*, with the Tax Court of the United States challenging the validity of the subject deficiency assessments.

During the Tax Court proceedings a controversy arose over whether petitioners were obligated to disclose information in their possession to the Commissioner. Petitioners resisted disclosure of their records pursuant to an order of the Tax Court, relying on the Fourth and Fifth Amendments to the Constitution, but maintained that they were ready to go to trial and carry their burden of proof as to the allegations in their petitions. In response to petitioners' initial refusal to comply with said order of the Tax Court, Judge Austin Hoyt addressed petitioners in open court and stated:

"You run the risk of the Court's entertaining a motion from the respondent to dismiss the case for your failure to prosecute it properly. Now, if that should happen, then the Commissioner is at liberty to assess the deficiencies as determined in the statutory notices against you and your only further recourse would be to pay the tax involved and sue to get a refund of those taxes that have been paid, in *another court*. But I want you to be sure you understand that, Mr. Ledford, because it is a grave risk you run and without counsel present to represent you, you may find yourself in serious difficulties with this case, as I say, in your case. Now, if you don't comply with the rules, you don't comply with the Court's Orders, then, if the case is dismissed, the Commissioner can assess the taxes and you'll

have to pay them and sue to get them back in *other courts*".³ (Emphasis added.)

Counsel for the Commissioner made no objection or comment to said statement by Judge Hoyt.

Relying on said statement by Judge Hoyt, petitioners believed that the remedy of a suit for refund was available to them and they continued to refuse to comply with the discovery orders on Constitutional grounds. Consequently, on June 14, 1971, Judge Hoyt entered a decision against petitioners pursuant to an Order of Dismissal entered on May 20, 1971.

On June 21, 1971, petitioners filed a timely notice of appeal. On May 24, 1973, the United States Court of Appeals for the Ninth Circuit issued a Memorandum Order of Affirmation of the dismissal in *Ledford v. Commissioner*, No. 71-1783. This Court denied review in *Ledford v. Commissioner* (1974) 415 U.S. 902.

Subsequent to the Memorandum Order of Affirmance, petitioners paid \$39,057.49 to the Commissioner and then filed claims for refund. On January 15, 1974, the Commissioner disallowed said claims by letter and informed petitioners that they had two years from the date of said letter to bring suit for the recovery of the taxes, penalties and other monies paid to the Commissioner.

On August 1, 1974, petitioners filed suit in the United States District Court for the Northern Dis-

³Clerk's Record on Appeal, p. 31, lines 7-21 in *Ledford v. Commissioner*, 9 Cir., No. 71-1783.

trict of California under 28 U.S.C. §1346 to recover said taxes paid. The United States moved to dismiss the complaint for lack of jurisdiction, or in the alternative for summary judgment, relying upon the theory of *res judicata* and/or 26 U.S.C. §6512(a) of the Internal Revenue Code. On January 3, 1975, the District Court granted the motion to dismiss on the basis that:

"Under Section 6512(a) of Title 26 U.S.C., a taxpayer may not file a civil suit for a tax refund if he has previously petitioned the Tax Court regarding the same claim."

On January 24, 1975, petitioners filed an appeal with the Ninth Circuit Court of Appeals, *Ledford v. United States*, No. 75-1410. On February 4, 1976, the Ninth Circuit issued a Memorandum affirming the District Court's dismissal. The Court found that "the mere fact of filing is sufficient to invoke the provision of 26 U.S.C. §6512(a) denying subsequent jurisdiction in any other court." (Emphasis added.) Petitioners' request for rehearing was denied on April 20, 1976.

REASONS FOR GRANTING THE WRIT

This petition raises an important question concerning the interpretation and construction to be given 26 U.S.C. §6512(a). The decision below should be reviewed because the construction and interpretation given to said statute by the court below and other lower federal courts renders said statute unconstitutional as being violative of the due process clause

of the Fifth Amendment.⁴ Said courts have construed 26 U.S.C. §6512(a) to mean that the mere fact of filing a petition with the Tax Court under 26 U.S.C. §6213(a) prohibits subsequent jurisdiction in any other court.

Petitioners assert that 26 U.S.C. §6512(a) must be construed to mean that it may be invoked only where the taxpayer has had a hearing on the merits or an opportunity to be so heard as was the factual situation in one of the cases cited by the Court of Appeals in its Memorandum, *United States v. Wolf*, 238 F.2d 447 (9th Cir., 1956). The only rational purpose of 26 U.S.C. §6512(a) is to prevent multiplicity of litigation. In 1924 Congress created the Board of Tax Appeals in order that the taxpayer could have a forum in which he could obtain an adjudication of tax liability prior to payment. H. R. Rep. No. 179, 68th Cong., 1st Sess. (1924). However, the Board essentially had only an advisory capacity in that either the taxpayer or the Government could pursue a refund suit in the District Court if dissatisfied with the Board's decision.

Recognizing the inefficiency of such a system, Congress in 1926 passed legislation forcing the taxpayer to choose between litigation prior to payment in the Board of Tax Appeals or subsequent to payment in the District Court. It cannot be disputed that

⁴The large majority of lower federal courts which have dealt with this issue have given 26 U.S.C. §6512(a) and its predecessor, section 322(c) of the 1939 Internal Revenue Code, the same literal construction as the Ninth Circuit Court of Appeals in the case before this Court.

some members of Congress intended the predecessors of 26 U.S.C. §6512(a) to be strictly construed in the same manner that it has been construed by most of the lower federal courts. See *Moir v. United States*, 149 F.2d 455, 458 fn.7 (1st Cir., 1945).

However, it is the duty of the federal courts as created by Article III of the Constitution to construe Congressional legislation in such a manner that said legislation is consistent with the Constitution, or if such a construction is not possible, to strike down said legislation. *Marbury v. Madison*, 1 Cranch. 137 (1803). This Court has stated in the past that the due process clause of the Fifth Amendment is a restraint on the legislative powers of government and that Congress is not free to make *any* process "due process" of law by merely so stating. *Den v. Hoboken Land and Improvement Co.*, 59 U.S. 277 (1856).

An asserted denial of due process of the law is to be tested by an appraisal of the totality of facts in a given case. *Betts v. Brady*, 316 U.S. 455 (1943). Strict construction of 26 U.S.C. §6512(a) would prevent the courts from examining any assertion of a denial of due process. The unjustness of such a construction is demonstrated by petitioners' plight. As this case presently stands, petitioners have not had a hearing concerning the taking of their property consistent with due process requirements. A strict construction of the subject statute forecloses the possibility of petitioners ever having such a hearing. Such a construction results in an unconstitutional deprivation of due process.

The Court of Appeals, in its Memorandum, recognized the inequity of such a construction and briefly concerned itself with what should have been the real issue; it stated that the due process rights of petitioners were not violated because petitioners were given the "opportunity to be heard". Petitioners do not contend that an actual hearing must be had in Tax Court, but only that they should have a valid opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965). The conclusion reached by the Court of Appeals fails to take into consideration two crucial points: 1) there was no valid basis in the Tax Court for a dismissal for lack of prosecution, and 2) the reliance of petitioners on the aforequoted statement of Judge Austin Hoyt.

The procedural framework involved in the assessment and collection of taxes is such that it induces the taxpayer to file a petition with the Tax Court. The statutory notice of deficiency sent to petitioners made reference only to the Tax Court as a means of contesting the validity of the Commissioner's deficiency assessments.⁵ Unless the taxpayer is represented by counsel there is a good possibility that he may not be aware that other forums exist for litigating the validity of the assessments.

At present petitioners have been deprived of their property through the unilateral action of the Tax Court. Petitioners were before the Tax Court in 1971. The Tax Court did not, and does not, have general

⁵Present statutory notices of deficiency still make reference only to the Tax Court.

discovery jurisdiction. *O'Dwyer v. C.I.R.*, 266 F.2d 575 (4th Cir., 1959); *C.I.R. v. Licavoli*, 252 F.2d 268, 272 (6th Cir., 1958). A dismissal for "lack of prosecution" requires that the party to whom the dismissal is being ordered is unable to or refuses to proceed under the *jurisdictional* prerequisites of the Court. Such was not the case with the petitioners. The objective of a proceeding before the Tax Court is to arrive at a determination as to whether the Commissioner's deficiency assessment is correct. *Helvering v. Taylor*, 293 U.S. 507 (1935); *Malat v. Commissioner*, 302 F.2d 700 (9th Cir., 1962). At all times petitioners indicated to the Tax Court that they were ready to proceed to trial on said issue.

The due process clause of the Constitution is rendered meaningless if the Tax Court is permitted to arbitrarily and unilaterally terminate litigation and thereby foreclose the taxpayer from seeking relief in another forum. Judge Hoyt appeared to be cognizant of this fact when he informed petitioners that if a dismissal was entered against them at that stage of the proceedings, petitioners would still have the opportunity to litigate the validity of the Commissioner's deficiency assessments in another forum.

Because of petitioners' reliance on Judge Hoyt's statement, the doctrine of equitable estoppel should be applied to prevent the Government from asserting 26 U.S.C. §6512(a) as a bar to petitioners' prosecuting their suit for refund in the District Court. This Court has never specifically ruled on the question as to whether the doctrine of equitable estoppel may be

applied to the federal government. However, in *United States v. California*, 332 U.S. 19, 39 (1947), it was implied that equitable estoppel may be applied to the federal government in extraordinary circumstances.

The question of whether equitable estoppel should be applied against the United States in the case before this Court is complicated by the fact that it was a Judge of the Tax Court who made the misrepresentation relied upon by petitioners. However, it should be noted that counsel for the Commissioner was present when said statement was made to petitioners. Counsel for the Commissioner neither said nor did anything to inform petitioners that they would not have the right to bring suit for refund in the District Court if their case was dismissed.

The lower federal courts have applied the doctrine of equitable estoppel against the Government where justice and fair play require it. *United States v. Wharton*, 514 F.2d 406, 409 (9th Cir., 1975); *Union Oil Co. of Calif. v. Morton*, 512 F.2d 743, 748 fn. 2 (9th Cir., 1975); *C. F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir., 1974). And said doctrine has been applied specifically to the Internal Revenue Service. *Vestal v. C.I.R.*, 152 F.2d 132, 136 (App. D.C., 1946).

There is one further point in opposition to a strict construction of 26 U.S.C. §6512(a). On December 23, 1975, the Ninth Circuit Court of Appeals, in *Haun v. Commissioner* (No. 74-2551) and the other related cases, reversed the dismissal of numerous taxpayers'

petitions by the Tax Court. The ground for the dismissals in the Tax Court was "failure to prosecute".

The similarity of the *Haun* cases to petitioners' case was noted both by United States Attorney Richard J. Sideman in a discussion in open court with Judge Wollenberg concerning petitioners' suit for refund, and by the Attorney General in his Brief for Appellee presented to the Court of Appeals in this case.

The principal difference between the cases is that in the present case petitioners have already paid over \$39,000.00 to the Commissioner. The fact that this appeal is coming from the District Court is not particularly significant when the purpose of the reversal in *Haun* is examined. In *Haun*, the Court of Appeals presumably felt that a judicial determination of the correctness of the Commissioner's deficiency assessments was needed. To accomplish this, the appellants' cases were remanded to the Tax Court for a redetermination. In petitioners' case, the Commissioner admitted during the proceedings in Tax Court that deficiency assessments known to be incorrect were issued in order that the Commissioner could have some sort of assessment before the statute of limitations ran. While this Court cannot remand petitioners' case to the Tax Court, the case can be remanded to the District Court in order that a redetermination of the deficiency assessment may be made and thus accord petitioners due process.

The facts and circumstances involved in petitioners' case make it a proper case to invoke the doctrine

of equitable estoppel. If this Court permits the strict construction of 26 U.S.C. §6512(a) to stand, then petitioners were induced by the representation of the Tax Court to waive their only opportunity to have a hearing on the merits. In accordance with *Betts v. Brady*, 316 U.S. 455 (1942), this Court should examine the totality of the facts presented herein in determining whether a strict construction of 26 U.S.C. §6512(a) is violative of petitioners' right to due process. Upon examination, the facts of this case establish the constitutional infirmities of a strict construction of said statute.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
July 12, 1976.

Respectfully submitted,
EARL G. STOKES,
STOKES, CLAYTON & MCKENZIE,
Counsel for Petitioners.

MICHAEL R. PINATELLI, JR.,
Of Counsel.

(Appendices Follow)

APPENDICES

A - 1

Appendix A

Do Not Publish

United States Court of Appeals for the Ninth Circuit

No. 75-1410

Raymond Ledford and Matilda Ledford, Plaintiff-Appellants, vs. United States of America, Defendant-Appellee.	}
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[February 4, 1976]

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: DUNIWAY and WRIGHT, Circuit Judges, and
LUCAS,* District Judge.

After they failed to cooperate in an I.R.S. audit for the years 1965-67, the Ledfords were assessed deficiencies in income tax for those years. They petitioned the Tax Court for a redetermination of those

*The Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.

deficiencies, but because of their refusal to produce necessary documents the Tax Court dismissed their action with prejudice for failure to prosecute. We affirmed, *Ledford v. Commissioner*, 9 Cir., May 24, 1973 (71-1783), *cert. denied*, 1974, 415 U.S. 902. The Ledfords paid the deficiencies and filed claims for refunds, which were denied. They then filed this action for refund in the district court, which dismissed for lack of jurisdiction. We affirm.

The Ledfords filed a timely petition with the Tax Court under 26 U.S.C. § 6213(a). The mere fact of filing is sufficient to invoke the provision of 26 U.S.C. § 6512(a) denying subsequent jurisdiction in any other court. *United States v. Wolf*, 9 Cir., 1956, 238 F.2d 447. This is true even if the petition is dismissed for lack of prosecution, as it was in this case. *Fiorentino v. United States*, 3 Cir., 1955, 226 F.2d 619; *Monjar v. Higgins*, 2 Cir., 1943, 132 F.2d 990.

The Ledfords' claim that they were denied due process by the Tax Court because they were not given a hearing is without merit. The Ledfords were given the opportunity to be heard, as due process required. They forfeited it by their refusal to properly prosecute their action. It is not a denial of due process to enter the default of a plaintiff who improperly refuses to produce documents necessary to the trial of the case. See *Hammond Packing Co. v. Arkansas*, 1909, 212 U.S. 322, 352.

Appendix B

In the United States District Court for the
Northern District of California

No. C-74-1610 ACW

Raymond E. Ledford and Matilda Ledford, aka Tillie Ledford, husband and wife,	} Plaintiffs,
vs.	
The United States of America,	} Defendant.

[Filed Jan. 3, 1975]

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This action is brought pursuant to 26 U.S.C. § 7422 for refund of income taxes paid. Jurisdiction to decide an action properly brought under 26 U.S.C. § 7422 is conferred upon this Court by 28 U.S.C. § 1346(a)(1). The question raised by Defendant's motion to dismiss or in the alternative for summary judgment is whether Plaintiffs' prior petition in the Tax Court regarding the same claim presented here deprives this Court of jurisdiction over the dispute.

Under Section 6512(a) of Title 26 U.S.C. a taxpayer may not file a civil suit in this Court for a tax

refund if he has previously petitioned the Tax Court regarding the same claim.¹ Plaintiffs claim Section 6512(a) is inapplicable because the Tax Court petition was dismissed for lack of prosecution and therefore was never decided on the merits. The Court of Appeals for this Circuit has given Section 6512(a) an interpretation which undercuts Plaintiffs' argument.

Under Section 6512(a) this Court's jurisdiction is determined not by the outcome of a Tax Court proceeding but by the mere filing of the petition in the Tax Court. *United States v. Wolf*, 238 F.2d 447, 449 (9th Cir. 1956), and cases cited therein. A reading of Section 6512(a) which is more permissive of District Court actions for tax refunds would allow the burdensome possibility of appealing an adverse Tax Court ruling to the Court of Appeals, then, if still dissatisfied, the taxpayer could file a new action in the District Court and take a second appeal in the Court of Appeals if a second adverse ruling is received from the District Court.

¹26 U.S.C. § 6512(a) provides in pertinent part as follows:

[I]f the taxpayer files a petition with the Tax Court within the time prescribed [by law], no credit or refund of income tax for the same taxable year . . . in respect of which the Secretary or his delegate has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court

The deficiencies which are the subject of this lawsuit were determined by the Commissioner of Internal Revenue (*See Exhibit A attached to affidavit of Raymond E. Ledford filed October 29, 1974*), and the Tax Court's denial of Plaintiffs' challenge of these deficiencies was affirmed by the Court of Appeals for the Ninth Circuit on April 24, 1973. *See Exhibit C attached to affidavit of Raymond E. Ledford, supra.*

It is apparent from the pleadings that this Court is without jurisdiction in this lawsuit. Accordingly, It Is Hereby Ordered that Defendant's motion to dismiss pursuant to F.R.Civ.P. Rule 12(b)(1) for lack of jurisdiction over the subject matter is Granted.

Dated: January 3, 1975.

Albert C. Wollenberg
United States District Judge

B - 4

In the United States District Court for the
Northern District of California

No. C-74-1610 ACW

Raymond E. Ledford and Matilda Ledford, aka Tillie Ledford, husband and wife, Plaintiffs,	}
vs.	
The United States of America, Defendant.	

[Filed Jan. 3, 1975]

JUDGMENT

Defendant having moved to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and the Court having considered oral and written arguments submitted by the parties, and a decision having been duly rendered,

It Is Hereby Ordered that Defendant's Motion to Dismiss is Granted, and the action is Dismissed.

Dated: January 3, 1975.

Albert C. Wollenberg
United States District Judge

C - 1

Appendix C

United States Court of Appeals for the Ninth Circuit

No. 75-1410

Raymond Ledford and Matilda Ledford, Plaintiff-Appellants,	}
vs.	
United States of America, Defendant-Appellee.	

[Filed Apr. 20, 1976]

Before: DUNIWAY and WRIGHT, Circuit Judges, and
LUCAS,* District Judge

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.